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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KEEAIRRA DASHIELL, Defendant and Appellant.	B300340 (Los Angeles County Super. Ct. No. SA061857)

APPEAL from an order of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Reversed and remanded with directions.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters and Susan Sullivan Pithey, Assistant Attorneys General, Idan Ivri and Charles S. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

In 2007, Tyquan Carl Knox, who was defendant and appellant Keeairra Dashiell's boyfriend, robbed Khristina Henry and another person at gunpoint. After Henry identified Knox as the robber, Knox shot and killed Henry's mother, Pamela Lark. Dashiell drove Knox to and from the murder scene. In 2013, Dashiell pled guilty to second degree murder. After passage of Senate Bill No. 1437 (Senate Bill 1437), Dashiell petitioned in the trial court for recall of her sentence and resentencing pursuant to Penal Code section 1170.95.[1] The court denied the petition on the ground that Senate Bill 1437 was unconstitutional.

Dashiell appeals, contending the trial court erred by finding Senate Bill 1437 unconstitutional and by summarily denying her petition prior to the appointment of counsel, even though there was a prima facie showing of her eligibility for relief under section 1170.95. We agree. We therefore reverse the trial court's order and remand the matter for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The murder*[2]

On September 2, 2006, Henry, Donovan Dias, and their friends visited a bowling alley. When they left after midnight, Knox and another man robbed Dias of his wallet and Rolex chain, and robbed Henry of her cellular telephone. One of Henry's friends recognized Knox. The next morning, Henry's mother, Lark, took Henry and Dias to the police station to report the

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[1] All further undesignated statutory references are to the Penal Code.

[2] We glean the facts from our unpublished opinion in *People v. Knox* (Apr. 23, 2014, B237213), of which we have taken judicial notice at Dashiell's request. (Evid. Code, §§ 452, subd. (d), 459.)

crimes. Henry named Knox as the robber, and subsequently identified him in a six-pack photographic lineup.

Thereafter, Knox's mother telephoned Henry three times and spoke to both Lark and Henry; during one of those calls, Knox got on the line and denied being the culprit. After Knox was charged with the robberies, a former friend of Henry's, Ryan Betton, began messaging her, asserting that Knox was not the robber. Henry informed a detective of the calls and messages and said she felt threatened. She and Lark asked for assistance relocating, but were unable to find a place they could afford.

When subpoenaed for the preliminary hearing, Henry was afraid to go, but Lark insisted that she testify. While at the courthouse, Henry saw Dashiell with Knox. The hearing was continued. Thereafter, Dashiell visited a coffee shop where Henry worked, ordered a drink, and stared at Henry.

On the morning of January 4, 2007, Lark, her teenage niece, and her two-year-old nephew were getting into Lark's car, which was parked in a back parking lot at Lark's apartment building. Knox, dressed all in black, approached Lark and demanded her purse; she told him there was nothing valuable inside. He then shot her multiple times and fled without taking the purse or other valuable items that were visible in the car. A witness saw Dashiell parked near Lark's apartment at approximately 9:30 a.m., and saw a person dressed like a "ninja" run close to Dashiell's car and possibly enter it.

In 2011, Knox was convicted of Lark's murder, with a "lying-in-wait" special circumstance.[3] He was also convicted of the robberies of Dias and Henry, the attempted robbery of Lark, and of attempting to dissuade a witness.

2. *Dashiell's plea*

Dashiell initially accepted a negotiated disposition, in which she agreed to plead to voluntary manslaughter and testify truthfully against Knox. She testified at Knox's first two trials, but not truthfully; accordingly, the negotiated disposition was vacated.

After Knox's conviction, Dashiell pled guilty to second degree murder with a principal armed allegation, and to attempted second degree robbery, in exchange for a sentence of 19 years to life. The court informed Dashiell that the information charged her with "a violation of Penal Code section 187(a), which alleges that on or about January 4, 2007, . . . you did commit the crime of murder, in that you did unlawfully and with malice aforethought murder Pamela Lark, a human being." Dashiell admitted she was pleading because she "did, in fact, commit" the offenses.

Dashiell was placed under oath, and the trial court and the prosecutor questioned her. She admitted that she drove Knox to Lark's residence, in Knox's car, at approximately 3:00 a.m. on the morning of January 4, 2007. Knox told her he was going to shoot Henry to prevent her from testifying against him. They waited for approximately six hours for Lark and Henry to emerge from

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[3] Knox's first two juries deadlocked on the robbery, attempted robbery, and murder charges. The first jury found him guilty of attempting to dissuade or intimidate a witness.

their apartment. Knox was dressed in black "from head to toe." He had a gun. After killing Lark, Knox returned to the car; at that point, Dashiell believed he had shot Henry. Dashiell drove him away from the murder scene. On one occasion prior to the murder, Dashiell went to Henry's residence with Betton to try to kill Henry.

The trial court sentenced Dashiell to a term of 19 years to life in prison, i.e., a determinate term of four years, followed by a term of 15 years to life.

3. *Dashiell's section 1170.95 petition*

On March 8, 2019, Dashiell filed a petition for resentencing pursuant to section 1170.95. Using a preprinted form, she checked boxes stating that a charging document had been filed against her allowing the prosecution to proceed under a felony murder theory or the natural and probable consequences doctrine; she pled guilty to first or second degree murder in lieu of going to trial because she believed she could have been convicted of those crimes pursuant to one or both of those theories; she could not now be convicted of murder in light of changes to the law wrought by Senate Bill 1437; and she was not the actual killer. She also checked a box stating, "I request that this court appoint counsel for me during this re-sentencing process."

The People filed an informal response, arguing that Senate Bill 1437 was unconstitutional. On June 18, 2019, the trial court denied the petition. Dashiell was not present and was not represented by counsel. The court's order stated, "Although it appears from the overall trial record that the petitioner may be entitled to relief pursuant to Penal Code [section] 1170[.95]/SB 1437 as she was neither the actual killer nor one who with the

intent to kill aided in the killing nor one who was a major participant who acted with reckless indifference, the court is denying the instant petition on constitutional grounds, specifically, finding that SB 1437 and/or P.C. section 1170.95 are unconstitutional in the manner that [they were] enacted." The court reasoned that Senate Bill 1437 impermissibly amended Propositions 7 and 115; violated the California Constitution insofar as it purported to vacate final judgments in criminal cases; and violated the separation of powers doctrine by infringing upon the Governor's pardon and commutation power and by commanding courts to reopen final judgments.

Dashiell filed a timely notice of appeal.

DISCUSSION

Dashiell contends that the trial court incorrectly concluded Senate Bill 1437 is unconstitutional, and further erred by dismissing her petition without appointing counsel for her and allowing briefing. She argues that she had the statutory and constitutional right to counsel, the deprivation of which amounted to structural error.

The People agree that Senate Bill 1437 is constitutional. Nevertheless, they urge that the trial court's order should be affirmed because the record indisputably shows Dashiell was ineligible for relief as a matter of law, and in any event, the court's failure to appoint counsel was harmless.

1. *Senate Bill 1437*

Senate Bill 1437, which took effect on January 1, 2019, "limit[ed] accomplice liability under the natural and probable consequences doctrine and the felony-murder rule." (*People v. Cruz* (2020) 46 Cal.App.5th 740, 755; *People v. Lamoureux* (2019) 42 Cal.App.5th 241, 246 (*Lamoureux*); *People v. Munoz* (2019) 39 Cal.App.5th 738, 749, review granted Nov. 26, 2019, S258234.) Prior to Senate Bill 1437's enactment, under the felony murder rule "a defendant who intended to commit a specified felony could be convicted of murder for a killing during the felony, or attempted felony, without further examination of his or her mental state." (*Lamoureux*, at pp. 247–248; *People v. Chun* (2009) 45 Cal.4th 1172, 1182.) " 'The felony-murder rule impute[d] the requisite malice for a murder conviction to those who commit[ted] a homicide during the perpetration of a felony inherently dangerous to human life.' " (*People v. Chun*, at p. 1184; *Lamoureux*, at p. 248.)

Similarly, under the natural and probable consequences doctrine, a defendant was "liable for murder if he or she aided and abetted the commission of a criminal act (a target offense), and a principal in the target offense committed murder (a nontarget offense) that, even if unintended, was a natural and probable consequence of the target offense." (*Lamoureux*, *supra*, 42 Cal.App.5th at p. 248*; People v. Chiu* (2014) 59 Cal.4th 155, 161–162; *People v. Munoz*, *supra*, 39 Cal.App.5th at p. 749, rev.gr.) " 'Because the nontarget offense [was] unintended, the mens rea of the aider and abettor with respect to that offense [was] irrelevant and culpability [was] imposed simply because a reasonable person could have foreseen the commission of the

nontarget crime.' " (*People v. Flores* (2016) 2 Cal.App.5th 855, 867.)

Senate Bill 1437 was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) "Senate Bill No. 1437 achieves these goals by amending section 188 to require that a principal act with express or implied malice and by amending section 189 to state that a person can only be liable for felony murder if (1) the 'person was the actual killer'; (2) the person was an aider or abettor in the commission of murder in the first degree; or (3) the 'person was a major participant in the underl[y]ing felony and acted with reckless indifference to human life.' " (*People v. Cornelius* (2020) 44 Cal.App.5th 54, 57, review granted Mar. 18, 2020, S260410; *People v. Tarkington* (2020) 49 Cal.App.5th 892, 896 (*Tarkington*); *People v. Verdugo* (2020) 44 Cal.App.5th 320, 325-326, review granted Mar. 18, 2020, S260493 (*Verdugo*).)

Senate Bill 1437 also added section 1170.95, which permits persons convicted of murder under a felony murder or natural and probable consequences theory to petition in the sentencing court for vacation of their convictions and resentencing. Section 1170.95 provides in pertinent part: "A person convicted of felony murder or murder under a natural and probable consequences theory" may file a petition "when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed

under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a).)

2. *Senate Bill 1437 is constitutional*

Subsequent to the trial court's ruling in this matter, numerous appellate courts have rejected challenges to Senate Bill 1437's constitutionality, and the parties agree it is constitutional. (See *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 275, 286 [Sen. Bill 1437 did not unconstitutionally amend Props. 7 or 115, because it neither added to, nor took away from, those initiatives]; *Lamoureux*, *supra*, 42 Cal.App.5th at pp. 246, 251–252, 256–257, 264–266 [Sen. Bill 1437 did not improperly amend Props. 7 or 115 or the Victims' Bill of Rights Act of 2008 (Marsy's Law), and does not violate separation of powers principles by usurping the executive's clemency power or impairing the judiciary's core functions]; *People v. Solis* (2020) 46 Cal.App.5th 762, 769, 779–780; *People v. Cruz*, *supra*,46 Cal.App.5th at p. 747; *People v. Bucio* (2020) 48 Cal.App.5th 300, 306, 310–314; *People v. Smith* (2020) 49 Cal.App.5th 85, 91–92; *People v. Prado* (2020) 49 Cal.App.5th 480, 483; *People v. Johns* (2020) 50 Cal.App.5th 46, 54–55.) We agree with the reasoning of these authorities. As the parties are also in agreement, it is unnecessary for us to further address the issue here. The trial court erred by denying the petition on the ground that Senate Bill 1437 is unconstitutional.

3. *Because the record does not demonstrate Dashiell's ineligibility as a matter of law, reversal is required*

The People recognize that the basis for the trial court's denial of Dashiell's petition was erroneous. However, citing the principle that we must affirm a ruling if it was correct on any ground (see, e.g., *People v. Hopson* (2017) 3 Cal.5th 424, 459; *People v. Jones* (2012) 54 Cal.4th 1, 50), they maintain that the court's order must be affirmed because Dashiell was ineligible for section 1170.95 relief as a matter of law. We disagree.

Evaluation of a section 1170.95 petition requires a multi-step process: an initial review to determine the petition's facial sufficiency; a prebriefing, "first prima facie review" to preliminarily determine whether the petitioner is statutorily eligible for relief as a matter of law; and a second, postbriefing prima facie review to determine whether the petitioner has made a prima facie case that he or she is entitled to relief. (*Tarkington*, *supra*, 49 Cal.App.5th at p. 897; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 327–330, rev.gr.; *People v. Torres* (2020) 46 Cal.App.5th 1168, 1177–1178, review granted June 24, 2020, S262011; *People v. Drayton* (2020) 47 Cal.App.5th 965, 975–976.)

When conducting the first prima facie review, the court must determine, based upon its review of readily ascertainable information in the record of conviction and the court file, whether the petitioner is statutorily eligible for relief as a matter of law, i.e., whether he or she was convicted of a qualifying crime, based on a charging document that permitted the prosecution to proceed under the natural and probable consequences doctrine or a felony murder theory. (*Tarkington*, *supra*, 49 Cal.App.5th at pp. 898–899; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 329–330, rev.gr.) If it is clear from the record of conviction that the

petitioner cannot establish eligibility as a matter of law, the trial court may deny the petition without appointing counsel. (*Tarkington*, at p. 898; *People v. Torres*, *supra*, 46 Cal.App.5th at p. 1178, rev.gr.; *Verdugo*, at pp. 330, 332–333; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1139–1140, review granted Mar. 18, 2020, S260598; *People v. Cornelius*, *supra*, 44 Cal.App.5th at p. 58, rev.gr.)[4] If, however, the petitioner's eligibility is not established as a matter of law, the court must appoint counsel and permit briefing to determine whether the petitioner has made a prima facie showing he or she is entitled to relief. (*Verdugo*, at p. 330; *Tarkington*, at p. 898.)

The limited record before us does not show Dashiell is ineligible for section 1170.95 relief as a matter of law. Dashiell was convicted of a qualifying crime, second degree murder. There is no dispute that she was an accomplice and not the actual killer. It also appears that the prosecution could have proceeded under a felony murder theory or the natural and probable consequences doctrine. The murder was committed in the course of an attempted robbery. Therefore, as far as the record shows, the prosecution could have advanced the theory that the killing was a natural and probable consequence of that target offense, or could have relied upon the felony-murder rule because the murder occurred during commission of the attempted robbery. (See § 189, subd. (a).)

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[4] Our Supreme Court is currently considering when the right to appointed counsel arises under section 1170.95, subdivision (c), and whether trial courts may consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under section 1170.95. (*People v. Lewis*, *supra*, S260598.)

The People nonetheless point to two circumstances that they contend demonstrate Dashiell's ineligibility. First, they assert that Dashiell pled guilty to "murder with malice aforethought, i.e., the specific intent to kill a human being." As noted, at the plea hearing the court informed Dashiell that the information charged her with "a violation of Penal Code section 187(a), which alleges that . . . you did commit the crime of murder, in that you did unlawfully *and with malice aforethought murder* Pamela Lark . . . ." (Italics added.) Dashiell admitted she was pleading because she "did, in fact, commit" the offenses.

Murder is "the unlawful killing of a human being, or fetus, with malice aforethought." (§ 187, subd. (a).) Malice can be either express or implied. (§ 188, subd. (a).) Express malice is the intent to kill. (§ 188, subd. (a)(1); *People v. Solis*, *supra*, 46 Cal.App.5th at pp. 774–775.) Malice is "implied when the killing resulted from an intentional act, the natural consequences of which are dangerous to human life, performed with knowledge of and conscious disregard for the danger to human life." (*People v. Thomas* (2012) 53 Cal.4th 771, 814; *People v. Cravens* (2012) 53 Cal.4th 500, 507; *People v. Palomar* (2020) 44 Cal.App.5th 969, 974.) Senate Bill 1437 did not alter these principles. After passage of Senate Bill 1437, an accomplice is still liable for murder if he or she acted with express or implied malice. (See *People v. Johns*, *supra*, 50 Cal.App.5th at pp. 57–59; *People v. Lewis*, *supra*, 43 Cal.App.5th at p. 1135, rev.gr.; *People v. Cornelius*, *supra*, 44 Cal.App.5th at p. 57, rev.gr.) Thus, if the record shows, as a matter of law, that Dashiell acted with express or implied malice, she is statutorily ineligible for relief.

But the problem with the People's argument is that murder, *by definition*, requires malice aforethought. (See § 187

["Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."].) Therefore, the trial court's mere recitation of the charge to Dashiell cannot, *by itself*, establish she admitted acting with malice as a matter of law. Were it otherwise, all defendants who pled guilty to murder prior to Senate Bill 1437's enactment would automatically be excluded from section 1170.95's ambit, because all such defendants pled guilty to an offense that, by definition, included the element of malice. Clearly, that was not the import of Senate Bill 1437, which expressly allows persons who were convicted of murder based on their "accept[ance of] a plea offer in lieu of a trial" to petition. Prior to enactment of Senate Bill 1437, the felony murder rule and the natural and probable consequences doctrine acted as exceptions to the malice requirement (*People v. Solis*, *supra*, 46 Cal.App.5th at p. 774), and therefore a defendant could have been convicted of murder absent malice. But the trial court here did not elicit from Dashiell an explicit admission that she acted with malice on the date of the murder, express or implied. Dashiell's plea to the murder count did not in and of itself specify the theory under which she was pleading, nor did it exclude the natural and probable consequences doctrine or felony-murder rule as bases for her guilt.

Second, the People contend that the record of the plea hearing demonstrates Dashiell was a direct aider and abettor. To prove liability for murder as a direct aider and abettor, the prosecution must show the defendant acted with knowledge of the perpetrator's criminal purpose and with the intent of committing, encouraging, or facilitating commission of the offense. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118; *People v. Chiu*, *supra*, 59 Cal.4th at pp. 166–167; *In re Brigham* (2016) 3

Cal.App.5th 318, 326 (*Brigham*).) The direct aider and abettor's mental state "must be at least that required of the direct perpetrator." (*People v. McCoy*, at p. 1118; *People v. Maciel* (2013) 57 Cal.4th 482, 518 ["when the crime is murder, the 'aider and abettor must know and share the murderous intent of the actual perpetrator' "].) " '[A]n aider and abettor will "share" the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' " (*People v. Maciel*, at p. 518.) Senate Bill 1437 "did not . . . alter the law regarding the criminal liability of direct aiders and abettors of murder because such persons necessarily 'know and share the murderous intent of the actual perpetrator.' [Citations.] One who directly aids and abets another who commits murder is thus liable for murder under the new law just as he or she was liable under the old law." (*People v. Lewis*, *supra*, 43 Cal.App.5th at p. 1135, rev.gr.)

The People assert that Dashiell's sworn statements at the plea hearing establish she was a direct aider and abettor as a matter of law. (See *Verdugo*, *supra*, 44 Cal.App.5th at pp. 329–330, rev.gr. [court considering petition should examine the "factual basis documentation for a negotiated plea"].) Dashiell admitted knowing Knox had a gun and planned to kill Henry to prevent her from testifying against him; she drove him to and from the murder scene; she waited with him for hours for Henry and Lark to exit their home; and she admittedly went to Henry's residence on a different occasion with the intent to kill her, or possibly Lark.[5]

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[5] The record is not entirely clear on this point. Dashiell admitted going to Lark's house with Betton to "try to kill her,"

But Dashiell did not admit she intended to aid and abet Lark's murder. While Dashiell's admissions may strongly suggest or arguably prove she acted as a direct aider and abettor to a planned murder of Henry, they do not establish, as a matter of law, that she was a direct aider and abettor to Lark's murder. Dashiell admitted that she knew Knox intended to kill Henry, to prevent Henry from testifying against him; she did not admit knowing he intended to kill *Lark*. Although the People attempt to dismiss this circumstance as insignificant, we do not agree.

Brigham, *supra*, 3 Cal.App.5th 318, is instructive. There, two "hit men," Brigham and Bluitt, had orders to kill one "Chuckie." (*Id.* at pp. 323–324.) Brigham saw a youth, Barfield, whom he mistakenly thought was Chuckie, and alerted Bluitt. Realizing his mistake, Brigham then told Bluitt that Barfield was not the intended victim; Bluitt said he was going to kill Barfield anyway. Brigham attempted to dissuade Bluitt and grabbed Bluitt's arm in an attempt to stop him from shooting. Nonetheless, Bluitt shot and killed Barfield. (*Id.* at p. 324.) Brigham's jury was instructed on direct aiding and abetting principles, as well as on the natural and probable consequences

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but also stated it was her intent at that time to kill Henry. But even if Dashiell admitted intending to kill Lark on a different date prior to the actual murder, that circumstance does not show, *as a matter of law*, that she intended to kill Lark on January 4. While a trier of fact might consider such an admission strong circumstantial evidence of Dashiell's intent to commit the charged murder, at the eligibility stage, a court must make all factual inferences in favor of the petitioner. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329, rev.gr.; *Tarkington*, *supra*, 49 Cal.App.5th at p. 898.)

doctrine, and convicted him of first degree murder as an aider and abettor. (*Id.* at pp. 325, 332.)

After *People v. Chiu* held that an aider and abettor could be convicted of first degree premeditated murder only as a direct aider and abettor (not under the natural and probable consequences doctrine), Brigham filed a habeas petition seeking reduction of his sentence or a new trial. (*Brigham*, *supra*, 3 Cal.App.5th at pp. 321–322; see *People v. Chiu*, *supra*, 59 Cal.4th at pp. 158–159.) The People argued Brigham could be liable for Barfield's murder because he had intended to facilitate a premeditated murder, albeit the murder of Chuckie rather than Barfield; thus he acted with the intent of a direct aider and abettor. (*Brigham*, *supra*, 3 Cal.App.5th at p. 327.)

Brigham rejected this argument, explaining: "Respondent's argument evokes the doctrine of transferred intent, under which ' "a defendant who shoots with the intent to kill a certain person and hits a bystander instead is subject to the same criminal liability that would have been imposed had " 'the fatal blow reached the person for whom intended." ' " ' " (*Brigham*, *supra*, 3 Cal.App.5th at p. 327.) But the transferred intent theory applies only when a perpetrator intends to kill one victim and unintentionally kills another. (*Id.* at p. 328.) "[I]f Bluitt intended to kill Chuckie and thought he was doing so, but accidentally killed Barfield, petitioner would have been liable as a *direct* aider and abettor under the doctrine of transferred intent; his aiding and abetting of the intended murder in essence assumed the risk that the perpetrator would mistakenly kill the wrong victim. But Bluitt's independent, intentional, deliberate and premeditated decision to kill a different victim would reflect a personal and subjective state of mind that was insufficiently connected to

petitioner's culpability for aiding and abetting the (intended) murder of Chuckie to justify holding petitioner liable for Bluitt's premeditated independent act." (*Id.* at p. 329.)

Applying these principles here, the record does not show as a matter of law that Dashiell was a direct aider and abettor in the murder of *Lark*, as opposed to *Henry*. The record before us does not suggest Knox mistakenly killed Lark, thinking she was Henry. Consequently, Dashiell's admissions that she knew Knox had a gun and intended to kill Henry, along with her admitted conduct of driving Knox to and from Lark's and Henry's home, do not establish as a matter of law that she directly aided and abetted Lark's murder. As in *Brigham,* the record before us does not show that the doctrine of transferred intent applies.

Verdugo, cited by the People, is distinguishable. There, Verdugo, Barraza, and a third man, all members of the Arizona Maravilla (AMV) gang, planned to retaliate against a rival gang, Mariana Maravilla (MMV), for beating up an AMV member. As planned, Verdugo drove into MMV territory, located an MMV member, "Young Guns," who was wearing a Los Angeles Lakers jersey, and radioed this information to Barraza. Barraza drove to the location identified by Verdugo, and " '[s]eeing that [the victim,] Ortiz was wearing a Lakers jersey and mistaking him for "Young Guns," ' " shot and killed Ortiz. (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 333–334, rev.gr.) *Verdugo* held that the trial court correctly found Verdugo ineligible for section 1170.95 relief because his murder conviction was necessarily predicated on a finding he acted with express malice. (*Id.* at p. 333.) The jury's verdict, that both Barraza and Verdugo were guilty of premeditated murder, necessarily included a finding that both harbored the specific intent to kill Ortiz. (*Id.* at p. 335.)

Therefore, "Verdugo's conviction for first degree murder was based on a jury finding he had aided and abetted Barraza in the commission of that offense and had acted with express malice in doing so." (*Id.* at p. 336.)

Verdugo does not assist the People here for two reasons. First, in *Verdugo* the killer mistakenly shot the wrong victim; Barraza intended to kill Young Guns, the MMV member identified by Verdugo, but accidentally killed another person who was dressed similarly. Thus, *Verdugo* does not suggest the transferred intent doctrine applies to a nonmistaken killing. Second, the appellate opinion on Verdugo's direct appeal conclusively showed the jury found he acted with express malice. Here, we do not have an equivalent conclusive showing that Dashiell was a direct aider and abettor or acted with express malice.[6] While her admissions at the plea hearing or other evidence might establish malice and her role as a direct aider and abettor if considered by a trier of fact, we cannot say they do so on this record as a matter of law. The court's role when making the first prima facie eligibility determination is "simply to decide whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329, rev.gr.; *Tarkington*, *supra*, 49 Cal.App.5th at p. 898.)[7]

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[6] A defendant's admissions at a plea hearing could, of course, provide conclusive evidence establishing ineligibility. However, they do not do so here.

[7] The People argue that, even if the trial court erred by summarily denying the petition, any such error was harmless. They assert that "the petition would have been denied regardless of what appointed counsel might have argued," and "[t]here is no

Because Dashiell is not ineligible as a matter of law, we reverse the trial court's order denying the section 1170.95 petition and remand for further proceedings consistent with section 1170.95.[8] The trial court is to appoint counsel for Dashiell and, after allowing for briefing, should proceed to consideration of whether Dashiell has established a prima facie showing of entitlement to relief, and, if so, issue an order to show cause and hold a hearing on the question.[9]

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interpretation of section 1170.95, subdivision (c), that would have permitted the trial court to issue an order to show cause, no matter what issues the parties would have briefed after the appointment of counsel." The People's argument appears to be based on their assertion that Dashiell was a direct aider and abettor as a matter of law, which we have rejected. We likewise reject the People's harmless error argument.

[8] We express no opinion on whether Dashiell may or may not ultimately be entitled to resentencing pursuant to section 1170.95.

[9] In light of our conclusion, we do not reach Dashiell's contentions that she had a constitutional right to appointment of counsel prior to denial of her petition, and that summary denial violated her due process rights.

DISPOSITION

The trial court's order denying Dashiell's section 1170.95 petition is reversed. The matter is remanded to the trial court to appoint counsel and conduct further proceedings in accordance with the requirements of section 1170.95.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.